

James R. Condo (#005867)
Kristine L. Gallardo (#033975)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, AZ 85004-2202
Telephone: (602) 382.6000
Facsimile: (602) 382.6070
jcondo@swlaw.com
kgallardo@swlaw.com

Richard B. North, Jr. (admitted *pro hac vice*)
Georgia Bar No. 545599
Matthew B. Lerner (admitted *pro hac vice*)
Georgia Bar No. 446986
NELSON MULLINS RILEY & SCARBOROUGH LLP
201 17th Street, NW / Suite 1700
Atlanta, GA 30363
Telephone: (404) 322-6000
Telephone: (404) 322-6050
richard.north@nelsonmullins.com
matthew.lerner@nelsonmullins.com

Attorneys for Defendants
C. R. Bard, Inc. and
Bard Peripheral Vascular, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability
Litigation,

This Document Relates to:

Debra Tinlin, et al. v. C. R. Bard, Inc., et al.
CV-16-00263-PHX-DGC

No. 2:15-MD-02641-DGC

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFFS'
MOTION *IN LIMINE* NO. 2:
VENA CAVA SIZE**

(Assigned to the Honorable David G.
Campbell)

(Oral Argument Requested)

1 Plaintiffs move to exclude highly relevant evidence and testimony concerning the
2 size of Mrs. Tinlin's inferior vena cava ("IVC"), and the related opinions of Bard's expert,
3 Christopher S. Morris, M.D. This Court should deny Plaintiffs' motion for three reasons:¹

4 **First**, the size of Mrs. Tinlin's IVC is a critical fact that is directly relevant to the
5 jury's determination of causation and should not be excluded. Bard has the right to
6 suggest potential alternative causes of Plaintiffs' injuries to "weaken" those claims of
7 injuries even "with medical proof couched in terms of possibilities." *Felde v. Kohnke*, 184
8 N.W.2d 433, 441 (Wis. 1971); *Westrich v. Mem'l Health Ctr., Inc.*, 831 N.W.2d 824 (Wis.
9 Ct. App. 2013) (finding reversible error in exclusion of evidence establishing a "potential
10 alternative cause" for plaintiff's injury where causation was a "key issue"). As the
11 Supreme Court of Wisconsin has made clear:

12 The burden of proof as to injuries is upon the plaintiff, and h[er] medical
13 testimony in meeting such burden cannot be based on mere possibilities.
14 However, a defendant in resisting such claim of injuries is not required to
15 confine himself to reasonable medical probabilities. . . . We see no
16 inconsistency in requiring that one with the burden of proof produce
medical testimony which is based upon reasonable medical probabilities and
at the same time in permitting the side which does not have the burden of
proof to attempt to upset such proof by showing other relevant possibilities.

17 *Hernke v. N. Ins. Co. of New York*, 122 N.W.2d 395, 399–400 (Wis. 1963); *accord Woody*
18 *v. Mercy Medical Center of Oshkosh*, No. 07CV678, 2010 WL 6620187 (Wis. Cir. Ct.
19 Oct. 25, 2010) (denying the plaintiff's motions *in limine* and holding that the defense has
20 the "right to suggest alternative casual possibilities" even with "possibility testimony . . .
21 offered in direct testimony by defense experts").²

22 ¹ Bard responds herein only to the arguments raised in Plaintiffs' original motion (Doc.
23 16578), and will respond to the arguments raised in Plaintiffs' supplemental motion (Doc.
16748) in a separate response on or before the deadline set by the Court. (Doc. 16749.)

24 ² *See also Roy v. St. Lukes Med. Ctr.*, 741 N.W.2d 256, 264 (Wis. Ct. App. 2007) ("[A]
25 defense expert is allowed to produce evidence of possibilities."); *Van Vreede v. Mich*, 513
26 N.W.2d 708 (Wis. Ct. App. 1994) (defendants permitted to "weaken the claim for injuries
with medical proof couched in terms of possibilities"); *Noel v. Wisconsin Health Care*
27 *Liab. Ins. Plan*, 458 N.W.2d 388 (Wis. Ct. App. 1990) (direct testimony of defendant's
experts based on "medical possibilities" proper); *Baumgarten v City View Nursing Home*,
28 No. 02CV2768, 2005 WL 6073784 (Wis. Cir. Ct. Feb. 21, 2005) ("[T]he defense argues
that a defendant, because the burden of proving the claim lies with the plaintiff, may
properly offer competent medical testimony as to alternative possibilities rather [than]
being required to demonstrate medical probability. That is a correct statement of law.").

1 Bard submits that Dr. Riebe's decision to implant the Recovery® Filter in Mrs.
2 Tinlin after measuring her IVC diameter at greater than 28 mm constituted medical
3 negligence that was a substantial factor in producing her alleged injuries. (*See* Mot. at 2;
4 Morris Rep. at 15-16 (Doc. 15081-1) (filed under seal).); Wis. II-Civil 1023 ("A doctor
5 who fails to conform to th[e] standard [of care] is negligent. . . . A person's negligence is a
6 cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in
7 producing the present condition of the plaintiff's health."). Therefore, Mrs. Tinlin's IVC
8 size is a critical fact in this case because had Dr. Riebe followed the Instructions for Use
9 ("IFU") and the standard of care, Mrs. Tinlin would never have received the filter, nor
10 been injured by it as she alleges.³ Put simply, this lawsuit would not exist.

11 It is undisputed that the IFU that accompanied the Recovery Filter that Mrs. Tinlin
12 received warned that the filter "***must not be***" used in patients with IVCs exceeding 28
13 mm. (Ex. A, Recovery IFU.) Indeed, the IFU explicitly included in a black box warning:

14 **CAUTION: If the IVC diameter exceeds 28 mm, the filter must not be inserted into the IVC.**

15 (*Id.*) The IFU also clearly warned elsewhere that "The Recovery Filter should not be
16 implanted in: . . . Patients with an IVC diameter larger than 28 mm," and "The Recovery
17 Filter is intended to be used in the inferior vena cava (IVC) with a diameter less than or
18 equal to 28 mm." (*Id.*) Plaintiffs' Motion seeks to interfere with Bard's right to "weaken"
19 their claim for injuries with alternative causes, including Dr. Riebe's negligent decision to
20 treat Mrs. Tinlin with the filter in the face of these clear warnings. It should be denied.

21 ***Second***, this evidence is highly relevant to the jury's apportionment of fault.
22 Plaintiffs argue that Dr. Riebe's negligence is not relevant to any issue in this trial simply
23 because they chose not to pursue a medical malpractice claim against him as a named
24 defendant. But Plaintiffs ignore that the jury ***must*** have the opportunity to consider the

25
26 ³ Plaintiffs contend that on May 8, 2005, the day after implant, the "filter was checked
27 [and] was in good position," and "subsequently, the filter fractured and migrated." (Mot.
28 at 2.) Plaintiffs fail to point out, however, that their own expert, Dr. Hurst, believes based
on his review of the CT scan from May 8, 2005 that the filter had experienced tilt of 18
degrees, caudal migration of 9 mm, and multiple penetrations of struts through Mrs.
Tinlin's IVC, including five Grade 3 penetrations. (Ex. B, Hurst Rep. at 3.)

negligence of all potential tort-feasors who contributed to the injury, including nonparties like Dr. Riebe. *See Connar v. West Shore Equipment of Milwaukee*, 227 N.W.2d 660, 662 (Wis. 1975) (“It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.”); *Johnson v. Heintz*, 243 N.W.2d 815, 827 (Wis. 1976) (inclusion of nonparties in special verdict “could have been requested”); *Martz v. Trecker*, 535 N.W.2d 57, 61 (Wis. Ct. App. 1995) (nonparty “properly included” in special verdict as “it gave the jury the opportunity to consider the negligence of all parties for comparison purposes”).

The *Connar* standard is “applicable to any tort action,” including cases involving medical negligence so long as expert testimony is provided on breach of the standard of care. *See Zintek v. Perchik*, 471 N.W.2d 522, 528 (Wis. Ct. App. 1991) (“[A]s applied in this case, *Connar* required that an expert give an opinion to a reasonable degree of medical certainty that [the nonparty physicians] were negligent before any question concerning their alleged negligence could be included on the special verdict.”), *overruled on other grounds by Steinberg v. Jensen*, 534 N.W.2d 361 (Wis. 1995); Wis. JI-Civil 1023 (“A doctor who fails to conform to th[e] standard [of care] is negligent.”). As Plaintiffs concede, Dr. Morris, Bard’s medical expert, opines “that Dr. Riebe’s decision to implant the filter fell below the standard of care.” (Mot. at 2.) Plaintiffs have not challenged this opinion. Therefore, the jury “must have the opportunity to consider the negligence” of Dr. Riebe “when apportioning negligence” in this case, regardless of Plaintiffs’ tactical decision not to bring suit against him. *Connar*, 227 N.W.2d at 662.

Third, the size of Mrs. Tinlin’s IVC is highly probative of Plaintiff’s failure-to-warn claims. The fact that Dr. Riebe ignored the black box warning in the IFU concerning IVC size is probative of Plaintiffs’ claims that Dr. Riebe would have read an IFU that contained an “adequate warning” and would have changed his decision to use the filter.

For these reasons, Bard respectfully requests that the Court deny this Motion.

1 RESPECTFULLY SUBMITTED this 12th day of April, 2019.

2 s/Richard B. North, Jr.
3 Richard B. North, Jr.
4 Georgia Bar No. 545599
5 Matthew B. Lerner
6 Georgia Bar No. 446986
7 NELSON MULLINS RILEY & SCARBOROUGH, LLP
8 Atlantic Station
9 201 17th Street, NW / Suite 1700
10 Atlanta, GA 30363
11 PH: (404) 322-6000
12 FX: (404) 322-6050
13 richard.north@nelsonmullins.com
14 matthew.lerner@nelsonmullins.com

15 James R. Condo (#005867)
16 Kristine L. Gallardo (#033975)
17 SNELL & WILMER L.L.P.
18 One Arizona Center
19 400 E. Van Buren
20 Phoenix, AZ 85004-2204
21 PH: (602) 382-6000
22 jcondo@swlaw.com
23 kgallardo@swlaw.com

24 **Attorneys for Defendants C. R. Bard, Inc. and**
25 **Bard Peripheral Vascular, Inc.**

Nelson Mullins Riley & Scarborough

LLP
201 17th Street NW, Suite 1700
Atlanta, GA 30363
(404) 322-6000